Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	MM Docket No. 01-235
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-317
	)	
Rule and Policies Concerning Multiple Ownership Of Radio Broadcast Stations in Local Markets	)	MM Docket No. 00-244
	)	
Definition of Radio Markets	)	

REPLY COMMENTS OF THE OFFICE OF COMMUNICATION, INC. OF THE UNITED CHURCH OF CHRIST, BLACK CITIZENS FOR A FAIR MEDIA, CIVIL RIGHTS FORUM, PHILADELPHIA LESBIAN AND GAY TASK FORCE, AND WOMEN'S INSTITUTE FOR FREEDOM OF THE PRESS

Maggie Martel
Chris O'Connell
Petra Smeltzer

Law Students

Amy R. Wolverton, Esq.
James A. Bachtell, Esq.
Angela J. Campbell, Esq.
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9535

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SUMMARY

The Office of Communication, Inc. of the United Church of Christ, Black Citizens for a Fair Media, Civil Rights Forum, Philadelphia Lesbian and Gay Task Force, and Women's Institute for Freedom of the Press ("UCC *et al.*") again urge the Commission to generally retain existing media ownership limits as necessary in the public interest.

Despite the claims of some commenters, the Commission cannot rely solely on the federal antitrust agencies' enforcement of antitrust laws in lieu of ownership limits. Such reliance would be inconsistent with the Commission's statutory mandate in the Communications Act, which requires the Commission to assure that all assignments or transfers of broadcast licenses are in the public interest. Because antitrust authorities focus solely on promoting competition and not on diversity or localism, the Commission's review of transfers of broadcast licenses is neither duplicative nor wasteful and often results in different analytical conclusions about a proposed transaction. Moreover, contrary to Fox *et al.*'s claims, competition in economic markets will not necessarily guarantee competition in the marketplace of ideas. Even if competition in economic markets resulted in competition in the marketplace of ideas, Fox *et al.*'s proposed analytical framework would essentially amount to an unworkable a case-by-case approach. Finally, the proposed alternative "unitary rule" is not in the public interest as it would lead to absurd results to the detriment of the public's interest in viewpoint diversity.

UCC *et al.* also urges the Commission to reject the National Association of Broadcasters' (NAB) proposed alternative to the current television duopoly rule because it would undermine the Commission's goals of viewpoint diversity, localism, and competition. Application of NAB's "10/10" rule would greatly reduce the number of diverse voices, both in large and small

communities, and in many cases would permit common ownership of even top-rated stations. In addition, the broad exceptions in NAB's proposal would swallow its presumptive rule.

Finally, UCC *et al*. demonstrate that broadcast ownership rules are subject to only minimal First Amendment scrutiny. Despite the growth of media outlets, broadcast spectrum scarcity persists as evidenced by intense marketplace competition for a limited amount of spectrum space. Further, the Commission's aspiration to promote viewpoint diversity in local news and programming does not alter their character as content-neutral structural regulations designed to enhance public access to a multiplicity of voices.

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INTRODUCTION

The Office of Communication, Inc. of the United Church of Christ, Black Citizens for a Fair Media, Civil Rights Forum, Philadelphia Lesbian and Gay Task Force, and Women's Institute for Freedom of the Press ("UCC *et al.*"), through undersigned counsel, submit these reply comments pursuant to the Commission's Notice of Proposed Rule Making[1] requesting comments regarding possible modification of the Commission's broadcast media ownership rules.

In their initial comments, the UCC *et al.* urged the Commission to generally retain, with some modification, the existing media ownership limits because they continue to be necessary in the public interest despite any proliferation in media outlets. UCC *et al.* explained that ownership limits advance the public's paramount First Amendment right to diverse, antagonistic sources of information. In addition, UCC *et al.* presented evidence demonstrating that the rules foster competition in news and informational programming and maintain multiple competing outlets in local communities to better support local needs. Finally, UCC *et al.* established that the rules promote greater opportunities for minorities, women, and small businesses to own broadcast stations.

Due to the extraordinarily high volume of initial comments and studies filed in this proceeding and the relatively short reply comment period, UCC *et al.* cannot reply directly to all objectionable arguments and data advanced by other commenters. These reply comments address three main issues. First, UCC *et al.* show that Fox *et al.*'s proposal to rely solely on enforcement of the antitrust laws would be inconsistent with the Communications Act and would

[1] *See* 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Proposed Rule Making, MM Dkt No. 02-277 (rel. Sept. 23, 2002) ("NPRM"); *see also* 2002 Biennial Regulatory Review, Public Notice MM Dkt No. 02-277 (rel. Nov. 5, 2002) (extending the deadline for reply comments in the proceeding to February 3, 2003).

fail to ensure competition in the marketplace of ideas. Second, UCC *et al*. demonstrate that NAB's proposed "10/10" rule for local television would greatly reduce competition, diversity and local service. Finally, UCC *et al*. show that due to continuing scarcity of the broadcast spectrum, as well as the content-neutral character of the media ownership rules, the rules need only satisfy rational basis review.

I. SOLE RELIANCE ON THE FEDERAL ANTITRUST AGENCIES' ENFORCEMENT OF ANTITRUST LAWS IS NOT IN THE PUBLIC INTEREST.

Fox, NBC and Viacom ("Fox *et al*.") and some other commenters argue that proper enforcement of antitrust laws by the federal antitrust agencies eliminates the need for any structural media ownership regulation by the Commission.[2] Based on the Statement of Dr. Bruce Owen attached to their comments, Fox *et al*. argue that economic markets are narrower and more concentrated than the marketplace of ideas, and that as a result, antitrust laws would prohibit consolidation in economic markets long before consolidation could become a threat to competition in the marketplace of ideas.[3] Thus, they claim that regulation of media ownership by the Commission is duplicative of the antitrust agencies and is therefore unnecessary.[4] In the alternative, they suggest that the Commission adopt a "unitary rule," which would treat all outlets with any local content equally, and presumptively grant all mergers where the number of outlets that would remain post-merger fall within a "safe harbor."[5]

The Commission must outright reject sole reliance on antitrust enforcement. First, the Communications Act directs the Commission to review the transfer of broadcast licenses under the public interest standard, which is different from and much broader than the antitrust law standards. For the Commission to defer to the antitrust authorities would be to abdicate its responsibilities under the Communications Act. Second, even if antitrust law could be relied upon to ensure economic competition, the existence of competition in the sale of advertising would not ensure adequate competition in and preservation of multiple viewpoints in the marketplace of ideas. Third, even assuming *arguendo* that it did, reliance on the antitrust law's

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[2] *See* Comments of Fox, *et al.* ("Fox Comments") at 26-29; *see also* Belo Corp. Comments at 25; Clear Channel Communications Comments at 8-9.
[3] Fox Comments at 27-29.
[4] *Id.* at 29.
[5] *Id.* at 59-66.

case-by-case approach would be burdensome, inefficient, and would lead to great uncertainty. Finally, the Commission should also reject the unitary rule/safe harbor approach because it would lead to absurd results.

A. Complete Deference to the Federal Antitrust Agencies Would be Inconsistent with the Commission's Statutory Mandate.

Fox *et al.*'s position is premised on a false assumption that the Commission essentially duplicates federal antitrust review.[6] However, because the communications and antitrust laws impose different requirements and have different goals, purposes, and procedures, review of proposed mergers by the Commission and by the federal antitrust agencies is not duplicative. Moreover, review of proposed mergers solely by the federal antitrust agencies would be inconsistent with the Commission's statutory mandate to act in the public interest.

1. Under the Communications Act, the Commission Must Assure That All Assignments or Transfers of Broadcast Licenses Are in the Public Interest, Which is Broadly Defined to Include Localism, Diversity and Competition.

Congress has mandated that no transfer or assignment of a broadcast license is allowed without Commission approval. Sections 309 and 310 of the Communications Act require that the Commission only grant assignments or transfers of broadcast licenses that serve the public interest, convenience and necessity.[7] The Commission has carried out this public interest standard in part by adopting local and national ownership rules designed to promote diversity and competition.[8] These structural media ownership rules presumptively establish when

[6] *Id.* at 27-29.
[7] 47 U.S.C. §§ 309(a), 310(d).
[8] *See, e.g., FCC v. NCCB*, 436 U.S. 775, 780 (1978) ("*NCCB*"); NPRM at ¶ 29.

common control of multiple licensees serves the public interest.[9]

The Commission's review of proposed mergers involving transfers or assignments of broadcast licenses not only permits but encourages public participation to ensure that the public interest is served.[10] Any resident of the viewing or listening area has a statutory right to file a petition to deny an application for assignment or transfer of a broadcast license.[11] Public participation in the Commission's review of proposed mergers involving assignments or transfers of broadcast licenses aids the Commission in developing a coherent national policy in conformity with the Communications Act.[12]

In reviewing a proposed merger, the Commission analyzes whether it would be consistent with the Communications Act, Commission rules, and policy objectives.[13] The Commission is, of course, required to reject a proposed merger that would violate the Communications Act. If a proposed merger would not contravene the statute, but would violate a Commission rule, then it will be approved only if the Commission finds that the public interest in that case is better served by waiving rule. A proposed merger involving assignment or transfer of broadcasting licenses that would neither violate the Communications Act nor the Commission's rule is nevertheless examined to determine whether it would substantially impair or frustrate the enforcement of the Communications Act or its objectives and whether the transaction would produce a potential

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[9] In *Storer Broad. Co. v. United States*, the Supreme Court upheld the Commission's authority to adopt ownership rules that embodied its view of the public interest, but cautioned that "in each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the public interest." 351 U.S. 192, 205 (1956), citing *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225 (1943) ("*NBC*").

[10] For example, Commission rules require that broadcast stations announce any proposed sale on the air and to place the documents regarding any proposed transfer in its public file.

[11] *See* 47 U.S.C. § 309(d)(1); *Office of Communication, Inc. v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

[12] *See* Harold Feld, *The Need for FCC Merger Review*, COMM. LAWYER, Fall 2000, at 20, 23 ("Feld").

[13] *See generally Air Virginia, Inc.*, 17 FCC Rcd 5423, 5426 (2002) ("*Air Virginia*"); *Mountain Wireless, Inc.*, 17 FCC Rcd 13914, 13917-18 (2002) ("*Mountain Wireless*"); *Sheldon Broadcasting, Ltd.*, 17 FCC Rcd 13931, 13934-35 (2002) ("*Sheldon*"); *Time Warner Inc. and America Online, Inc.*, 16 FCC Rcd 6547, 6549-50 (2001) ("*AOL-Time Warner Merger*"); *Comcast Corp. and AT&T Corp.*, ¶¶ 26-27 (rel. Nov. 14, 2002) (2002 WL 31526762).

public interest benefit in furtherance of the Act's policies. The burden of proof that a proposed merger is in the public interest is on the applicants.[14]

2. Under Antitrust Laws, Antitrust Authorities are Concerned Solely with Promoting Competition.

In contrast with the broad public interest mandate of the Communications Act, the main goal of the antitrust laws is achieving competition in economic markets.[15] The Antitrust Division of the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") are responsible for antitrust law enforcement.[16]

The federal antitrust agencies' procedures for reviewing proposed mergers differ significantly from those employed by the Commission. Whereas the Communications Act requires the Commission to approve every transfer of a broadcast license, the antitrust agencies only review large mergers.[17] Thus, smaller acquisitions of radio stations could evade antitrust review even though they may have significant impacts on the communities that they serve.

Moreover, the Communications Act dictates that broadcast licenses may not be transferred until approved by the Commission, while no prior approval by antitrust authorities is required for a merger to take place. The pre-merger filing under Hart-Scott-Rodino merely triggers a 30-day waiting period, during which the federal antitrust agencies may take a "quick look" at a proposed merger and decide whether it raises any concerns requiring investigation.[18] If the agency takes no action during the waiting period, the parties are free to consummate the

[14] 47 U.S.C. § 309(e); *see, e.g.,* AOL-Time Warner Merger, 16 FCC Rcd at 6554.
[15] *See* E. Thomas Sullivan & Jeffrey L. Harrison, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS, § 1.01 (3rd ed. 2000) ("Sullivan & Harrison").
[16] *See id.* § 3.01.
[17] Under the Hart-Scott-Rodino Improvements Act of 1976, only companies proposing mergers involving certain minimum monetary amounts have to file a pre-merger notification. Hart-Scott-Rodino Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390 (codified as amended at 15 U.S.C. §18a (2002)).
[18] *See id.*

merger.[19] If the agency decides to challenge the proposed merger, it is required to prove to a federal court that the merger would violate antitrust laws under the same substantive legal standard that the agency would have to meet in a post-merger antitrust challenge.[20] Requiring the antitrust agency to demonstrate that a merger violates the law places a great burden on the government. In contrast, under the Communications Act, the applicants have the burden of demonstrating that the merger is in the public interest.

In addition, unlike Commission review, the federal antitrust agencies conduct their reviews in secret.[21] Thus, antitrust agencies fail to consider the views of interested citizens, and the practice of negotiating behind closed doors renders development of any consistent public interest policy impossible.[22]

Finally, the legal standards for antitrust review of media mergers are quite different and narrower than the public interest standard of the Communications Act. Section 7 of the Clayton Act prohibits mergers that are "likely to substantially lessen competition in any line of commerce."[23] To determine whether a specific proposed merger is likely to substantially lessen competition, the federal antitrust agencies utilize the *Horizontal Merger Guidelines.* The *Merger Guidelines* focus on estimating the market power of potential participants in a proposed merger by defining a product market, a geographic market and the parties' market shares in such a market.[24]

The antitrust agency begins its analysis under the *Merger Guidelines* with a narrow product market and asks whether a "small but significant and nontransitory" price increase

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[19] *See Id.*
[20] *See* Feld at 20, 23.
[21] The pre-merger notification process is designed to protect the business proprietary information of the proponents of the merger and of market participants. *See id.*
[22] *Id.*
[23] 15 U.S.C. § 18 (2001).
[24] *See* Sullivan & Harrison § 7.09.

(usually of 5%) would cause consumers to switch to a substitute product (or products).[25] If so, then the selected market is too narrow and the agency expands the market by including the substitute product in it.[26] The agency repeats this process up to the point at which consumers would not find any attractive substitute for their desired product and thus cannot shift to any different substitute product in reaction to the price increase.[27] A similar process is used to define the proper geographic market.[28] Once the proper product and geographic markets have been established, the agency determines the market shares of merging firms in the relevant markets. In analyzing proposed mergers of radio stations, for example, the Department of Justice has found the relevant product market to be radio advertising and the relevant geographic market to be the community served by the radio station.[29]

To assess the impact of the proposed merger on competition in the relevant markets, the agency utilizes the *Herfindahl-Hischman Index* ("HHI").[30] The agency will generally challenge a merger in a moderately concentrated market (HHI between 1,000 and 1,800) if the merger

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[25] 1992 Horizontal Merger Guidelines § 1.11 (as revised Apr. 8, 1997), available at www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html ("Merger Guidelines"). Specifically, the Merger Guidelines examine the elasticity both of demand and of supply. This elasticity is assessed by asking what would happen in the relevant market if a hypothetical firm would increase its prices in a small but significant and nontransitory manner. If the consumers in the relevant market would react to such a price increase by switching to other products, or by switching to the same products manufactured by other firms in other areas, then demand in the relevant market is elastic. If other producers of other products would react to such a price increase by shifting and producing the products in the relevant market, or by modifying the use of present facilities, or by shifting the production of the present facilities, or by constructing new facilities, then supply in the relevant market is elastic. If either demand or supply is elastic, then the relevant market is not monopolistic, and the antitrust authority keeps expanding the relevant product or geographic market to the point when supply or demand stop being elastic. The Merger Guidelines also examine efficiencies and barriers to entry in the relevant market. *See* Sullivan & Harrison § 7.09.

[26] Merger Guidelines § 1.11.

[27] *Id.*

[28] *Id.* § 1.21. The agency again begins with a narrow geographic market and it keeps expanding the market up to the point when consumers will no longer be able to turn to other geographic areas to purchase their desired product. *Id.*

[29] *See, e.g,.* DOJ Comments in re: Application of Citadel Communications Corp. and Marathon Media L.P, File No. BALH-990209 C4 (Apr. 26, 1999) at 7-9.

[30] *Merger Guidelines* §1.5 . The calculation of the HHI is done by squaring the percentage market share of each firm in the market and adding these squares together.

would increase concentration by more than 100 points, and in a highly concentrated market (HHI above 1,800) if it would result in an increase of more than 50 points.

3. Commission Review of Broadcast License Transfers is Neither Duplicative nor Wasteful.

As demonstrated above, the Commission and the federal antitrust authorities have different roles in the review of proposed mergers. The Commission has long recognized this fact. For example, in *Air Virginia*, Chairman Powell emphasized that:

> [u]nlike antitrust agencies, which focus solely on whether the effect of a proposed merger "may be substantially to lessen competition," the Commission must examine other factors. Indeed the Communications Act compels us to consider the broad aims of "ensuring the existence of an efficient nationwide radio communications service" and promoting locally oriented service and diversity in media voices. . . . In short, the Communications Act does not permit the Commission to turn a deaf ear to radio listeners.[31]

While the Commission may utilize the analytical framework of the *Merger Guidelines,*[32] that analysis comprises only part of the Commission's review. In reviewing mergers, the Commission takes into account such factors as the impact on the news programming available in the market, opportunities for minority ownership, and service to underserved areas.[33] Moreover,

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[31] *Air Virginia*, 17 FCC Rcd at 5441 (Chairman Powell, separate statement) (footnotes omitted); *see also Mountain Wireless*, 17 FCC Rcd at 13917-18; *Sheldon*, 17 FCC Rcd at 13934-35; *AOL-Time Warner Merger*, 16 FCC Rcd at 6549-50.

[32] *See, e.g.*, *Mountain Wireless*, 17 FCC Rcd at 13919-26. *See also Air Virginia*, 17 FCC Rcd at 5428-34.

[33] *See, e.g.*, *Stockholders of CBS, Inc*., 11 FCC Rcd at 3778 (despite diminution in diversity as result of waivers, finds transaction in public interest due to locally significant programming commitments, pledges to attempt to divest to minority buyers, and increases in amount of children's educational programming); *Shareholders of Citicasters, Inc.,* 11 FCC Rcd 19135, 19143-44 (1996) (finding temporary waiver of one-to-a-market rule in public interest where applicant pledged to use savings to improve news coverage and enhance community affairs programming, including commitments to specific news and public affairs programming); *Counterpoint Communications, Inc*., 16 FCC Rcd 15044, 15046-48(201) (Commission relied on program commitments, including a new, monthly 30-minute public affairs program addressing local issues and a new weekly public interest show hosted and directed to issues of concern to local high school students, in granting 6-month waiver of the Newspaper/Broadcast Cross-Ownership Rule); *cf. Paramount Stations Group of Philadelphia, Inc.*, 10 FCC Rcd 10963, 10967 (1995) (to obtain a duopoly rule waiver even where overlapped stations located in different markets, the Commission expects "that in addition to satisfying the several factors evaluated in a duopoly waiver request, the applicant will offer concrete public interest benefits, such as expanded and quantifiable local or public affairs programming and/or an increased and substantial physical presence in an underserved area").

the Commission balances the consequences of a proposed merger that may be beneficial in one way and yet harmful in another.[34]

Thus, Dr. Owen's claim that the Commission merely duplicates the work of the antitrust agencies is unfounded. Indeed, he admits that in antitrust enforcement the DOJ "has not, in practice, addressed competition in the marketplace of ideas."[35] Although he cites the proposed merger between Echostar and DirecTV as an example of such duplication, in fact, this example shows the opposite. While the Department of Justice's Complaint analyzes the proposed merger only in terms of the impact on competition in the market for multichannel video programming distribution,[36] the Commission's Hearing Designation Order also examines the impact of the transaction on diversity and on its spectrum policy and rules.[37]

Because they use different standards, the Commission and antitrust agencies have not reached identical conclusions in other merger cases. In the case of *AOL-Time Warner,* for example, the Commission imposed additional conditions above and beyond those imposed by the FTC.[38] Similarly, in the *AT&T-Comcast* merger, the DOJ decided not to challenge the proposed

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[34]For example, combining assets may allow the merged entity to reduce transaction costs and offer new products, but it may also create excessive market power, enhance barriers to entry by potential competitors, and place rivals at an unfair disadvantage. *See, e.g.*, *Air Virginia*, 17 FCC Rcd at 5426.

[35] *See* Fox Comments Exhibit 3/Bruce Owen's Statement on Ownership Rules 4 ("Owen's Statement"); *see also* Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249, 256 (2001) ("Stucke & Grunes").

[36] Complaint in *United States v. Echostar Communications Corp.*, D.D.C. No. 1:02CV02138, at 12-17 (filed Oct. 31, 2002).

[37] For example, the Commission found that Echostar and DirecTV exercised editorial discretion to select programming channels carried on their distribution systems and that the "aggregation of the vast majority of current DBS channels by one such editor reduces the potential for different editors to deliver a variety of news and current affairs to Americans through the carriage of different news and public affairs channels. This development harms viewpoint diversity by reducing the number of MVPD editors in all markets, and leaving only one in some markets." *EchoStar Commnicatios Copr, Hearing Designation Order,* CS Docket No. 01-349, at ¶ 51 (rel. Oct. 18, 2002).

[38] 17 FCC Rcd at 6678-6681. For example, the Commission imposed conditions augmenting the Federal Trade Commission decree to prevent AOL-Time Warner from utilizing indirect means to disadvantage unaffiliated ISPs. 16 FCC Rcd at 6601. It also imposed conditions to prevent AOL Time Warner's likely domination of the competitive business of new IM-based services. *Id.* at 6627. The FCC also considered whether the proposed merger would create public interest harms with regard to electronic programming guides, broadcast signal carriage, DBS ownership, interactive television and program access for MVPD providers. *Id.* at 6630-51.

merger, while the Commission approved it subject to certain conditions.[39]

In sum, federal antitrust agencies review only large mergers that fall within the financial threshold requirement of Hart-Scott-Rodino, and those are reviewed only to assess whether they would result in a substantial lessening of competition in economic markets. In contrast, the Commission reviews all broadcast license transfers pursuant to the Communications Act's requirement that any grant serve the public interest. An assessment of the proposed transfer's impact on diversity of voices, as well as public participation, is integral to the public interest standard. Thus, the Commission may not, consistent with its statutory mandate or with the public interest, rely solely on antitrust review.

B. Competition in Economic Markets will not Necessarily Result in Competition in the Marketplace of Ideas.

Even if the Commission could legally rely solely on antitrust agencies, it would not adequately ensure diversity in the marketplace of ideas. Fox *et al.* argue, on the basis of Dr. Owen's Statement, that proper application of antitrust laws "ensures that media consolidation will be stopped long before it poses a threat to competition in the marketplace of ideas."[40] Dr. Owen makes three unfounded assertions: 1) "markets for ideas are much broader than corresponding economic markets;" 2) "relevant markets for ideas are less concentrated than narrowly-defined economic markets served by given outlets because of the way that shares are measured;" and, 3) entry in the marketplace of ideas is easier than in economic markets.[41] Each of these claims is demonstrably false.[42]

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[39] 2002 FCC WL 31526762, at ¶ 222 (to avoid harm to competition and diversity in video programming, applicants required to insulate and divest AT&T's interest in TWE). *See also* ¶ 25 (for part DOJ decided not to challenge).
[40] *See* Fox Comments at 28.
[41] Owen's Statement at 11.
[42] Dr. Owen's Statement clearly reflects his or his clients' views of what the FCC's goals and the legal and policy context in which the Commission operates should be rather than what they actually are. For example, Dr. Owen claims that diversity is "not a reasonable goal" for the Commission. *Id.* at 4. But in reality, diversity is central to the

First, a market for ideas does not exist in the same way, for example, as markets for the sale of advertising on local radio stations. The term "marketplace of ideas" comes from Justice Holmes's famous dissent in *Abrams v. United States*.[43] He explained that the First Amendment protects even unpopular speech because "the ultimate good desired is better reached by free trade in ideas" and "that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[44] Thus, the "marketplace of ideas" is the "sphere in which different values compete for acceptance."[45]

The purpose of having a competitive marketplace of ideas is not economic efficiency but a well-functioning democratic society. As Justice Frankfurter pointed out in his concurring opinion in *Associated Press v. United States*:

> A free press is indispensable to the workings of our democratic society. The business of the press, and therefore the business of the Associated Press, is the promotion of the truth regarding public matters by furnishing the basis for an understanding of them. *Truth and understanding are not wares like peanuts or potatoes*.[46]

The differences between an economic marketplace and the marketplace of ideas, which Consumer Federation of America ("CFA") *et al*. refer to as the "forum for democratic discourse," are discussed at length in their comments.[47] For example, CFA *et al*. point out that for meaningful democratic discourse to occur, citizens must have the opportunity to speak as well as to watch or listen.[48]

"public interest," is mandated by the Communications Act, as amended, and has been recognized by the Supreme Court. Similarly, Owen characterizes the "scarcity doctrine" as "factual and economic absurdity." *Id.* at 5. But as discussed infra at Part III(A), spectrum scarcity continues to this day and courts have properly continued to apply different First Amendment analysis to broadcasting.

[43] 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)

[44] *Id*.

[45] *See* Stucke & Grunes at 251 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 1383 (Merriam-Webster 1986)).

[46] 326 U.S. 1, 28 (1945) (Frankfurter, J., concurring) (emphasis added).

[47] CFA *et al.* Comments at 20-39.

[48] *Id.* at 23-26. Moreover, as Professor Baker points out, "the media should be an instrument of a society-wide public sphere that addresses common problems, values, and solutions and allows all groups to participate in a

Because the marketplace of ideas is a helpful metaphor rather than a real market, UCC *et al.* question the wisdom of even attempting to analyze it under an antitrust theory. How, for example, would one define the relevant product? Under the *Merger Guidelines*, the analysis begins with the narrowest possible market definition (in product as well as in geographic terms). The product in the marketplace of ideas cannot be an "idea," for an "idea" is too broad a concept. At best, one might be able to show different relevant markets such as local news or national news.

In their article advocating that antitrust authorities should take the marketplace of ideas into account in reviewing media mergers, Stuck and Grunes identify a number of problems in attempting to apply an antitrust analysis to these "markets."[49] One problem is that the Merger Guidelines use customers' likely response to increases in price to define the relevant market. However, it is impossible to measure response to price increases where, as in the case of radio or television news, customers do not pay directly for the product.[50] Another problem is how to measure substitutability when

> [w]hat is prized in the marketplace of ideas is diversity among differentiated products rather than substitutability. The focus is not only on consumers' shifting between ABC and CBS evening news as the primary news source, but having many independent voices supplying the marketplace with news.[51]

Another problem is how to assign market share where some sources are obviously more influential than others.[52]

To the extent that antitrust analysis could be used to identify a relevant product within the marketplace of ideas, there is no reason to assume that the product market is broader than the

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society-wide discussion of the 'common good.'" Edwin C. Baker, *Media Concentration: Giving Up On Democracy*, 54 FLA. L. REV. 839, 916 (2003).

[49] Stucke & Grunes at 251.

[50] *Id.* at 276.

[51] *Id.* at 276-77.

[52] *Id.* at 277.

market for advertising. An example illustrates this point. In analyzing a proposed merger between two television networks, assume that national television news is one relevant product market and that the national advertising time is another. It is likely that the national advertising market is broader than the national news market because many cable networks sell national advertising spots, but only a few provide national news.

Not only is there no reason to conclude that the marketplace of ideas is broader than economic markets, there is no reason to accept Dr. Owen's claim that markets for ideas are less concentrated than economic markets. In an economic market, market share is generally determined by looking at the percentage of revenue. Obviously, this approach does not work where the public does not pay for broadcast programming, so instead, one might consider using ratings or some other measure of consumer use. Dr. Owen, however, proposes to count each outlet or firm equally.[53] This proposal would have the practical effect of assigning the same market share to John Doe's personal web page, which may have no visitors, as to NBC Network News, which reaches 34.7 million viewers.[54] If, as this example suggests, the public does not view John Doe's web site as a substitute for NBC Network news, they are not in the same market, and it is unreasonable to conclude that the market place of ideas is broader than economic marketplace.

For similar reasons, Dr. Owen's claim that entry into the marketplace of ideas is easier than entry into economic markets must be rejected.[55] He asserts that "politically, socially or otherwise significant information can enter the marketplace of ideas through a single web site, newsgroup, or chat room and be disseminated extremely widely among the community."[56] While

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[53] Owen's Statement at 13.
[54] UCC Comments at 60.
[55] Owen's Statement at 11.
[56] *Id.* at 13.

many people can afford to express ideas on a personal web page, newsgroup or chat room, the content provided in these fora is rarely comparable to that provided by the broadcast media.[57] Providing national news, for example, is an extremely expensive operation.[58] Moreover, web sites, newsgroups and chat rooms are not usually publicized and simply do not reach an audience comparable to that of the mass media. Thus, while the Internet has facilitated some degree of democratic discourse, it has not eliminated barriers to entry in the marketplace of ideas.

C. Even if Competition in Economic Markets Resulted in Competition in the Marketplace of Ideas, the Analytical Framework Proposed by Dr. Owen Would Essentially Result in a Case-by-Case Approach That is Neither Practical nor Desirable.

Even if competition in economic markets could adequately ensure competition in the marketplace of ideas, reliance on antitrust laws without the aid of ownership rules would not be practical or desirable. Because, as described above, antitrust review is done on a case-by-case basis, antitrust authorities face a tremendous burden to gather the information necessary to identify the relevant markets and assess the competitive impact in each individual case. Moreover, this burden would be greatly increased if the existing broadcast ownership rules were repealed because antitrust authorities would have to review additional mergers that at present are either routinely granted because they comply with the rules or do not get proposed because they would not comply with the rules.[59] Furthermore, such investigations can consume large amounts

[57] In fact, the means of communication are more comparable to the ability people have always had to engage in conversion, give speeches on street corners, or distribute newsletters and pamphlets.

[58] In *Associated Press v. United States*,[58] the Supreme Court implicitly recognized the significant barriers to entry in the form of high fixed costs of news collection, and it held that Associated Press had to allow access to nonmembers to its news wire service for a fee, even though Associated Press was not a monopolist and even though other competitive services collecting news existed. 326 U.S. 1, 17-18 (1945). *See also* UCC Comments at 61 (noting the large cost of providing national and international news).

[59] The amount of data and resources needed to analyze even a single market is illustrated by Economic Study F: Bruce M. Owen & Kent W. Mikkelson, *Counting Outlets and Owners in Milwaukee: An Illustrative Example*, Comments of Fox. *et al.* ("Milwaukee Study"). For example, it notes that in an actual merger investigation, it would be desirable "to determine more precisely the reach of radio signals in the DMA, perhaps through the use of

of time and resources not only of the antitrust agencies but of parties to the merger and third parties.[60] Because the antitrust agencies lack the resources to investigate all proposed mergers raising concerns, mergers would likely slip through that would reduce competition and diversity. Alternatively, some mergers that would not raise any competition or diversity concerns would not be undertaken because of the uncertainty and cost involved. In either case, the public interest would be harmed by leaving review of media mergers solely to the antitrust agencies.

D. The Commission Should Reject Fox *et al.*'s Proposed Alternative "Unitary Rule"

As an alternative to sole reliance on antitrust review, Fox *et al.* propose that the Commission adopt what it terms a "unitary rule."[61] Under this proposal, every potential source of local information within a local market would be counted equally.[62] Fox *et al.* also suggest a safe-harbor approach in which the Commission would automatically approve any proposed transaction so long as the requisite minimum number of independent voices remained post-transaction.[63] While they do not suggest the appropriate safe harbor number, they argue that it should be the same regardless of market size.

Fox *et al.*'s unitary rule would lead to absurd results. The absurd results can be illustrated by using data from Fox *et al.*'s Exhibit F, which attempts to calculate the number of local media outlets available to the average person in the Milwaukee DMA. This analysis counts

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broadcast signal contours." *Id.* at 5. This analysis of the local information market in Milwaukee, which is 23 pages long and contains nine tables, draws on multiple data bases and makes numerous complex calculations, and even on it own terms remains incomplete.

[60] For the same reasons, UCC *et al.* oppose the proposal of some commenters, *see, e.g.*, Paxson Comments at 29-30, that the Commission simply review broadcast license transfers on a case-by-case basis. Without media ownership rules, many more applications would be designated for hearing. The Commission is well aware of the time and costs involved in holding hearings. *See, e.g.*, *Changes in the Entertainment Formats of Broadcast Stations*, 60 F.C.C. 2d 858, 864-65 (1976).

[60] *Id.* at 9846, n. 204.

[61] Fox Comments at 59-66.

[62] *Id.* at 60-61.

[63] *Id*. at 64.

the number of daily newspapers, weekly newspapers, television stations, radio stations, cable television systems, regional magazines and Internet web pages with local content available in the Milwaukee DMA. It concludes that the average household in Milwaukee DMA has 170 local outlets available, of which over 100 are local Internet web pages.[64]

The practical effect of assigning each voice equal weight is to treat the Milwaukee Akido Club's web page as the equivalent of the Fox television station even though their reach and impact are widely disparate. Under the safe harbor, the merger of two television broadcast stations would be treated the same as the merger of two local web sites. However, because local broadcast stations are the primary sources of news and local information,[65] the impact of these two mergers would be radically different.

Another problem is how to determine the appropriate number of outlets. Even if the number were set very high, for example, at 100, in the Milwaukee DMA, all of the television stations, daily newspapers, weekly newspapers, radio stations, cable television and magazines would be permitted to merge.[66] Moreover, a one-size-fits all safe harbor as proposed by Fox *et al.*[67] cannot possibly be appropriate for all communities regardless of the number of television channels allocated to the market, the size of the population, and the diversity of the community. Yet, establishing different safe harbors for different types of markets would be unduly complicated.

Finally, even if a unitary rule could be justified, it would extremely difficult to apply in practice. For each proposed transaction, the parties and/or the Commission would need to

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[64] Milwaukee Study at 8.
[65] *See* UCC Comments at 23-26, 43-44.
[66] An extreme case such as this one would undoubtedly be challenged under the antitrust law, but as discussed above, the antitrust law is not sufficient to protect the public interest in having viewpoint diversity and multiple stations responding to local programming needs.
[67] *See* Fox Comments at 64.

determine the number of local outlets, which would be expensive, time-consuming, and likely to be contested. As noted by NAB, the definition of the relevant geographic area for measuring diversity under a unity rule would be impossible because different media outlets reach varied geographical areas.[68] Moreover, not only is there no easy method to determine the number of web sites with local informational content, but the number is likely to change frequently. Thus, instead of providing ease and simplicity, a safe harbor as proposed by Fox *et al*. would have disadvantages similar to a case-by-case approach.[69]

II. THE COMMISSION SHOULD REJECT NAB'S 10/10 PROPOSAL BECAUSE IT WOULD UNDERMINE THE COMMISSION'S GOALS OF VIEWPOINT DIVERSITY, COMPETITION AND LOCALISM.

The National Association of Broadcasters ("NAB") proposes an alternative to the current television broadcast duopoly rule that would permit any station with a viewing share less than 10 to be a part of a duopoly, regardless of the size of the other station.[70] In determining viewing share, cable and DBS, as well as television signals from neighboring markets, would be included. While proposed duopolies meeting the "10/10" standard would be presumptively permitted, NAB would also allow duopolies for stations with larger viewing shares, and even triopolies, on a case-by-case basis. UCC *et al.* oppose this proposal.[71]

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[68] *See* NAB Comments at 54-55.
[69] *See supra* at I(C).
[70] NAB Comments at 79. The viewing share would be determined by an average of the last four Nielson book ratings, taking into account all viewing from 7 a.m. to 1 a.m. Nielson determines broadcast market shares four times a year, which reflect each station's share of total viewing in each DMA, adjusted for lost viewing to out-of-market stations, cable channels and non-commercial stations. *Id.*
[71] While UCC *et al.* oppose NAB's proposed elimination of the current duopoly rule, they support NAB's position in its comments filed with the National Affiliated Stations Alliance that the 35 percent national television ownership cap is necessary to promote localism and competition.

A. Rather Than Ensuring a Minimum Number of Viewpoints, NAB's Proposed Rule Would Greatly Reduce the Number of Independently Owned and Operated Stations and Viewpoints in Local Communities.

In contrast to the current rule, which prohibits duopolies from forming where there would be less than eight independent voices remaining in the market, the NAB's proposed rule does not ensure a minimum level of viewpoint diversity. In fact, NAB's proposal would result in a significant decrease in the number of independent station owners.

As shown in Exhibit 1 to these comments, smaller markets (below DMA rank 50) typically have five independent commercial broadcast television stations with measurable viewing share.[72] At most, three of these stations will have a viewing share of 10 or more, meaning that there will always be two duopoly combinations that would fit under NAB's presumptive rule.[73] The elimination of two of these independent voices in each market results in a 40% reduction in broadcast television viewpoint diversity.[74]

For example, in Boise, Idaho, there are five stations with measurable market share. Under NAB's proposal, KTVB (NBC), the station with the largest viewing share of 26, could form a duopoly with KBCI (CBS)—the third largest station. KIVI (ABC), the market's second largest station with a viewing share of 10, could merge with the fourth largest station, KTRV (Fox). This would leave only three independent voices—KTVB/KBCI, KIVI/KTRV and the remaining

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[72] This exhibit analyzes 14 DMA markets and shows the average viewing share for each television station in these markets over the last four quarters. Taking into account current duopolies, it also shows how many independent broadcast television voices there currently are and how many would likely remain under the NAB 10/10 presumptive rule. The information was taken from the BIA Financial Network, Investing in Television Market Report 2002 (4th ed. 2002) ("2002 BIA Report"). To calculate viewing shares for each broadcast television station, the numbers from the Daypart Share Analysis were tabulated for each station and averaged for the last four Nielsen books.

[73] Exhibit 1 at 2

[74] *Id.*

UPN affiliate, KNIN-TV.[75] In the case of Springfield, Mo., the 10/10 rule would permit a 50% reduction in the number of owners, from six to three.[76]

Even the larger markets would experience a major decrease in independently owned stations under NAB's 10/10 proposal. In major cities, the number of independent voices in the broadcast television market could fall 25% to 43% with NAB's presumptive rule in place.[77] In Kansas City, for example, there are currently seven owners of the eight television stations with a measurable viewing share. Under NAB's proposal, four owners could control all eight television stations in Kansas City.[78]

1. Despite NAB's Contentions, Its Proposal Would Permit Common Ownership of Top-Rated Stations in Many Markets.

NAB contends that diversity and competition would be preserved because the 10/10 rule would prevent the two higher rated stations in the market from combining.[79] However, application of the rule shows otherwise. In the San Francisco DMA, for example, only ABC's KGO-TV had an average viewing share of 10 or more for the past four Nielsen books.[80] Thus, under the NAB proposed rule, KGO-TV could acquire any other station, allowing one owner to control the two highest rated television stations in San Francisco, the country's fifth largest

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[75] *Id.* at 15.
[76] *Id.* at 11.
[77] For instance, taking into account current duopolies, the number of New York television station owners could go from eight to five under NAB's proposed rule, Los Angeles could go from seven to five, and Phoenix from eight to five. These figures are counting only stations that have measurable viewing shares in their DMA and do not include future diminution of owners that could result from NAB's proposed waivers. S*ee id*. at 2.
[78] *Id*. at 2, 8.
[79] NAB Comments at 82.
[80] Exhibit 1 at 5. KGO-TV (ABC) had an 11.5 average viewing share. KNTV (ABC) had 9.2; KTVU (Fox) had 8.5; and KPIX-TV (CBS) had 7.9. *Id.*

market. In Washington, D.C., the situation would be similar as three of the four top stations had average viewing shares below or very near 10.[81]

Even in many smaller markets, NAB's proposed rule would not prevent combinations of the two highest ranked stations. In its own example, NAB shows that WTOC (CBS affiliate) and WSAV (NBC affiliate), the two highest ranked stations in Savannah, Georgia, could form a duopoly.[82] The same would be true in the Macon, Georgia DMA, where WMAZ (CBS affiliate) had a viewing share of 33.5 while the other affiliates had shares under 5.[83] In this market, the NAB plan would allow WMAZ to buy up any other broadcaster in the DMA and become even more dominant.

2. NAB's Proposal Would Not Ensure Multiple Sources of Local Television News.

While NAB bases its proposal on the need to assure adequate sources of local television news, its proposed test fails to ensure this goal by allowing mergers without regard to the effect on local news production and availability. Specifically, by including viewing share of cable and DBS, which provide little or no independently-produced local news,[84] the proposed test artificially deflates viewing share and too easily allows mergers between television stations that currently produce independent news programs, which may even lead to a single monopoly provider of local television news.

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[81] *Id.* at 6. In the Washington, D.C. DMA, WJLA-TV (ABC) had a 10.1 viewing share; WUSA (CBS) had a 9.8 viewing share; and WTTG (Fox) had a 9.4 viewing share. The leading station, WRC-TV (NBC), had a 13.5 viewing share. *Id.*

[82] National Association of Broadcasters Notice of *Ex Parte* Communication, MB Dkt. No. 02-277, filed Jan. 8, 2003 ("NAB *Ex parte*").

[83] 2002 BIA Report at DMA Rank: 122. WMGT (NBC) has a viewing share of 4.8; WGXA (Fox) has a viewing share of 3.6; and WPGA-TV (ABC) has a viewing share of 2.8. For the methodology on calculating the viewing shares, *see supra* note 72.

[84] UCC Comments at 29-33.

For example, in the Bluefield, West Virginia DMA,[85] only the ABC affiliate, WOAY-TV and NBC affiliate, WVVA, provide local news.[86] Since WOAY-TV has a viewing share below 10, WVVA could acquire WOAY-TV under NAB's proposed rule and control the local news market.[87] Monopolistic news markets could form in other smaller markets as well under NAB's proposal. One owner could also control all the broadcast television news in the Sherman, Texas/Ada, Oklahoma DMA, where only two stations, KTEN and KXII, produce local news programs. Because KTEN has a viewing share of 8.5, it could form a duopoly with KXII.[88] The market in Marquette, Michigan, could also be left with one local news voice. News-producing WJMN-TV, which has a viewing share of 9.56, could join with the only other local news station, WLUC-TV.[89] Thus, instead of ensuring multiple sources of local news, NAB's 10/10 proposal could lead to local news monopolies.

3. NAB's Proposed Rule Would be Subject to Manipulation.

NAB says that it chose 10 as the viewing share cut-off for permitting duopolies because it "separates market leading from non-leading stations on a reasonably consistent basis across DMAs of varying size."[90] In many markets, however, 10 is the average share for any given broadcast station and not a dividing line between the top and bottom stations. For example, in the Washington, D.C. market, the top four stations average viewing share is 10.7, with three of

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[85] Referred to as the Bluefield-Beckley-Oak Hill, W.Va. DMA. *See* 2002 BIA Report at DMA Rank: 149.

[86] *Id*. Markets that had only two broadcast stations carrying local news were identified using data from a study Fox *et al.* submitted with their comments in this proceeding. *See* Bruce Owen *et al.*, *Economic Study A: News and Public Affairs Programming Offered by the Four Top-Ranked Versus Lower-Ranked Television Stations*, tbl. A1. Then, the local programming guides on the web sites of each station in the market were examined to determine which stations carry local news.

[87] 2002 BIA Report at DMA Rank: 149.

[88] *Id.* at DMA Rank: 160.

[89] *Id.* at DMA Rank: 177

[90] NAB Comments at 82.

the stations within 1 share of 10.[91] In fact, the CBS affiliate had a 10.4 viewing share during the four Nielsen periods in 2001 and a viewing share of 9.8 in 2002.[92] In New York, two of the top four stations are well below the 10-share cutoff and a third has a viewing share of only 11.6. In these circumstances, stations might take advantage of temporary low viewing shares (or even seek to temporarily lower their shares) to obtain a presumptive waiver. And, once a duopoly is permitted, NAB proposes that the stations would never need to be separately sold, even if viewing shares increased.[93] Thus, the NAB proposed rule would encourage such manipulation and lead to unnecessary concentration in contravention of the public's interest in diversity and competition.

4. NAB Fails to Justify the Use of the 10/10 Standard.

NAB attempts to justify its 10/10 proposal on the grounds that lower-rated stations are "unable to survive as independent entities on a long term basis" and that duopolies will prevent stations from going under, thus preserving existing local news operations and promoting new ones.[94] NAB, however, has not shown that all, or even most, stations with a viewing share under 10 are in financial distress. Moreover, assuming *arguendo* that some stations with low viewing shares are in financial distress, NAB has not shown that allowing mergers of those stations will result in any benefits to the public.[95]

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[91] Exhibit 1 at 6.
[92] *Id.*; BIA Financial Network, Investing in Television Market Report 2001, DMA Rank: 8 (4th ed. 2001) ("2001 BIA Report"). For the methodology on calculating the viewing shares from the 2001 BIA Report, *see supra* note 72.
[93] NAB Comments at 84.
[94] *Id.* at 82.
[95] Yet, the Commission has traditionally declined to intervene in cases involving a station's economic situation, even when intervention might improve the broadcaster's service to the community. *See, e.g.*, *Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd. 638, 640 (1988) (abolishing the policy of examining whether a new station would cause economic injury to an existing one); *Deletion of Noncommercial Reservation of Channel 16, 428-488 MHZ, Pittsburgh, Pennsylvania*, 11 FCC Rcd 11700, 11704, 11712 (1996) (where noncommercial license claimed that financial difficulties would forced it to

NAB's financial distress rationale is based on its own study which purports to find that many stations in smaller markets are "struggling to achieve profitability."[96] Yet, the study does not attempt to show that having a viewing share under 10 is correlated to a station's ability to compete in that market or remain financially viable. The study only examines two broadcast television stations in each market—the top-ranked station and the bottom-ranked station, making no attempt to obtain a representative sample of television stations. Moreover, by looking at the weakest station in the each market, NAB was assured of finding indications that stations were experiencing financial distress.

Furthermore, the study has very little relevance to the proposed NAB rule since the bottom-ranked affiliate in medium and smaller markets typically has a viewing share much lower than 10. For instance, the low-rated station in Springfield, Missouri had a viewing share of 5.5 and the low-rated station in Boise, Idaho had a viewing share of 5.3.[97] Many low-rated stations had even smaller viewing shares. In Topeka (DMA rank 124), the low-rated affiliate station had a market share of 1.3, while the Billings, Montana (DMA rank 170) low-rated station had a viewing share of 3.1.[98]

In fact, many stations with market shares under NAB's cutoff are very competitive and profitable. For example, NAB argues that the rule would allow the two lower-rated stations in Springfield, Missouri to merge and effectively compete with the larger broadcast stations.[99] However the two lower-rated stations, KDEB-TV (Fox) and KSPR (ABC), are doing quite well.

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drastically curtail both local and national programming, the Commission noted that the finances of a station are only relevant in broadcast license applications).

[96] Theresa J. Ottina, National Association of Broadcasters, *The Declining Financial Position of Television Stations in Medium and Small Markets* (Dec. 2002) ("NAB Study"). Attachment C to NAB's Comments.

[97] Exhibit 1 at 11, 15. These stations were KDEB-TV (Fox) and KTRV (Fox) respectively. These markets were used as examples in NAB's comments. *See* NAB Comments at 82. The NAB Study did not list the individual markets that it analyzed.

[98] These stations were KTMJ-TV (Fox and UPN) and KHMT (Fox) respectively. 2002 BIA Report. For the methodology on calculating the viewing shares, *see supra* note 72.

[99] NAB Comments at 82 n.151.

Not only did the two stations each earn at least $6 million in 2001, both received a share of market revenues greater than its local commercial share of the viewing audience.[100]

NAB further attempts to justify its proposal on the grounds that common ownership will help ensure the viability of local news operations.[101] However, NAB offers no evidence that the merged stations will use any increased profits for local news or other locally-oriented informational programming. Even if both stations do provide local news, they will not provide competing viewpoints in that community.

B. NAB's Proposed Exceptions Swallow its Proposed Rule.

NAB's proposed exceptions would allow common ownership regardless of station size and permit triopolies on a case-by-case basis, essentially swallowing its 10/10 rule.[102] Case-by-case consideration would include whether a station has failed, was failing or unbuilt, and whether the waiver would facilitate the transition to digital broadcasting.[103]

1. NAB's Proposed Test for Failed, Failing and Unbuilt Stations is Too Broad.

The current duopoly rule already provides for waivers for failed, failing or unbuilt stations when specific criteria have been met.[104] NAB, however, proposes a more relaxed waiver

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[100] 2002 BIA Report at DMA Rank: 73. KDEB-TV had an estimated 2001 revenue of $6.9 million and an estimated power ratio of 1.05. KSPR had an estimated 2001 revenue of $6 million and an estimated power ratio of 1.22. The estimated power ratio is the ratio of revenue share to audience share and is calculated by determining the estimated revenue share for the station and dividing this by the local commercial share. *Id.* at 11.
[101] NAB Comments at 78.
[102] NAB Comments at 79.
[103] *Id.* at 80-81.
[104] For example, in order to be "failed," a station must be "one that has been dark for at least four months or is involved in court-supervised involuntary bankruptcy or involuntary insolvency proceedings" and "the waiver applicant demonstrate that the 'in-market' buyer is the only reasonably available entity willing and able to operate the failed station, and that selling the station to an out-of-market buyer would result in an artificially depressed price for the station." *Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, Report and Order*, 14 FCC Rcd 12903, 12937 (1999) ("*Local TV Ownership Report and Order*").

standard, which would only operate to the detriment of the public interest.[105] UCC *et al.* oppose relaxation of the waiver standard.

The current waiver standard is adequate to ensure that communities do not lose an important broadcast voice due to financial hardship.[106] Moreover, by making it easier to obtain waivers, the Commission would undermine opportunities for new owners to enter a market. Distressed properties may offer minorities, women and other new entrants an opportunity to own a television station.[107] Just because a station is experiencing financial difficulties under one owner does not mean that a new owner, with new ideas and perhaps a desire to serve unserved audiences, will not be successful.

Furthermore, if adopted, NAB's proposed waiver standard would lead to a flood of waiver requests and potentially permit an almost unlimited number of duopolies and even triopolies. For example, NAB argues that "an applicant for a 'failing station' waiver should *not* be required to demonstrate a negative cash flow, as a positive cash flow does not necessarily demonstrate viability."[108] Yet, under NAB's own analysis, even the highest rated stations in many medium and small markets are experiencing flat or declining profits.[109] Moreoever, NAB seeks to dispense with the current requirement that a waiver applicant show that the in-market buyer is the only reasonably available entry willing and able to acquire the station and that sale

[105] NAB Comments at 80.
[106] In fact, the current waiver policy for television duopoly failing, failed and unbuilt stations is a broader waiver policy than that of the radio-television cross-ownership rules. *Local TV Ownership Report and Order*, 14 FCC Rcd at 12935, 12954-55 (1999). In rejecting a waiver for a failing station under the radio-television cross-ownership rule, the Commission stated that, "evidence that a station is losing money (i.e., a negative cash flow) is not adequate to qualify for the waiver." *Id.* at 12955.
[107] The most recent Commission data indicates that, in 2001, only 4% of television stations were owned by women and only 3.5% were owned by minorities. *See* www.fcc.gov/ownership/data.html. Studies reveal that obtaining access to capital is the greatest impediment to female and minority ownership, which have been exacerbated by rising station prices. NOW *et al.* Comments in MM Dkt. No. 02-277 at 5, filed Jan. 2, 2003.
[108] NAB Comments at 80 n.149 (emphasis added).
[109] *Id.* at 76; NAB Study at 5-9. Moreover, the profitability of broadcast stations change frequently due to changes in the economy, and the economic situation of any one station could be subject to manipulation for purposes of obtaining a waiver.

to an out-of-market buyer would result in an artificially depressed price.[110] These unwarranted changes would permit many more stations to obtain waivers, thus undermining the very existence of the rule—to preserve multiple, diverse viewpoints in each market.

2. Allowing Waivers For DTV Transition would undermine both the Duopoly Rule and the Transition to DTV.

NAB's proposed waiver to help stations pay for the cost of transitioning to digital television would likewise completely undermine its proposed rule. A very large number of stations have already claimed financial hardship in converting to digital[111] and more undoubtedly would do so if they could then acquire another station in their market. In fact, allowing a waiver on these grounds could provide an incentive for these stations to stall efforts in adopting the new digital format to demonstrate that they are unable to afford the transition, thereby undermining the Commission's goal to "encourage broadcasters to offer digital television as soon as possible."[112]

For all of these reasons, the Commission should reject NAB's 10/10 proposal as well as the proposed exceptions.

III. THE CONTINUING SCARCITY OF THE BROADCAST SPECTRUM AND CONTENT-NEUTRALITY OF THE BROADCAST OWNERSHIP RULES MANDATE ONLY MINIMAL FIRST AMENDMENT SCRUTINY.

As shown above, neither sole reliance on antitrust laws nor NAB's proposed 10/10 rule would advance the Commission's goals of diversity, localism, and competition. Thus, the

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[110] NAB Comments at 80 n.148.

[111] There were 843 commercial television broadcasters requesting extensions of time for the May 1, 2002, DTV deadline. Of those, 772 were granted due to financial hardship or other circumstances. Despite the FCC's six-month deadline extension, 602 broadcasters requested additional time to finish the conversion to digital. *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television*, FCC 03-8 (rel. Jan. 27, 2003).

[112] *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fifth Report and Order*, 12 FCC Rcd 12809, 12812 (1997).

Commission should retain its broadcast ownership regulations to further the paramount First Amendment rights of the public to receive information from multiple antagonistic sources. In doing so, the Commission would not be unconstitutionally impinging on the First Amendment rights of others as some commenters have claimed.

A. The Scarcity of the Broadcast Spectrum, the Foundation for the Rational Basis Standard, Remains Today Notwithstanding Growth in the Number of Media Outlets.

As discussed in UCC *et al.*'s initial comments, courts have upheld broadcast ownership limits and applied rational basis scrutiny based on the scarcity of the broadcast spectrum.[113] Comments of Fox *et al.* and Sinclair Broadcast Group argue that the mere increase in the number of media outlets voids the validity of the scarcity rationale as the basis for application of relaxed scrutiny to ownership regulations.[114] In a strained effort to support its assertion, Sinclair mischaracterizes the focus of the scarcity rationale as a "scarcity of viewpoints," or "channels"[115] when, in fact, the scarcity rationale turns on the *physical* limits of the broadcast *airwaves* or *spectrum*.[116]

Thus, regardless of the proliferation of media outlets, physical limitations of the broadcast spectrum remain today. In fact, media companies challenge ownership limits precisely because of the limited number of broadcast licenses and spectrum space.[117] Consequently, courts continue to apply the rational basis standard to broadcast ownership limits.[118] Just recently the D.C. Circuit rejected the very same arguments Sinclair is making in this proceeding and noted

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[113] UCC Comments at 62.
[114] *See* Sinclair Comments at 52-9; Fox Comments at 9, 50-51; Owen's Statement at 5-6.
[115] *See* Sinclair Comments at 53-55.
[116] *NBC*, 319 U.S. at 226; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969) (*"Red Lion"*); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637-38 (1994) ("*Turner I*"), *NCCB*, 436 U.S. at 799.
[117] *See Fox Television Stations Inc. v. FCC*, 280 F.3d 1027, 1046 (D.C. Cir. 2002) ("*Fox Television*") (noting that but for spectrum scarcity, ownership limits would be irrelevant).
[118] *Fox Television*, 280 F.3d at 1046 ("the scarcity rationale is implicated in this case").

that Sinclair's "protest that *NCCB* is no longer controlling because it is undermined by the advent of cable television, DBS, and the internet, is to no avail."[119]

The Supreme Court's observation in *Red Lion* that "[a]dvances in technology . . . have led to more efficient utilization of the frequency spectrum, but uses for the spectrum have also grown apace" remains true today.[120] With the explosive growth of cellular telephone and other wireless services, "[s]pectrum is the gold of the early 21st century."[121] Accordingly, companies have been willing to pay staggering sums to obtain the right to use the spectrum.[122] The Commission has even decided to allow spectrum sales and forgo the funds that would have been received from an auction to make room for Third Generation broadband services on an already over-crowded spectrum.[123] The volume of license applications before the Commission provides further evidence of the continuing scarcity of the broadcast spectrum. In 2000, for example, the Commission received over 1200 applications for low-power broadcast stations even though only "a tiny fraction" of those applicants would receive licenses.[124]

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119 *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 168 (D.C. Cir. 2002), *reh'g denied*, 2002 U.S. App. LEXIS 16618 (D.C. Cir. Aug. 12, 2002) ("*Sinclair*").

120 *Red Lion*, 395 U.S. at 396-97. Because technological advancements have actually acted to increase the scarcity of the broadcast spectrum, *FCC v. League of Women Voters* does not call for re-evaluation of the scarcity rationale. *See* Fox Comments at 9; Owen's Statement at 6.

121 Barnaby J. Feder, *FCC Expected to Extend Satellite Operators' Reach*, N.Y.TIMES, Jan. 27, 2003, at C6.

122 *See*, *e.g.*, Stephen Labaton with Andrew Ross Sorkin, *Wireless Companies May be Near Deal for New Licenses*, N.Y. TIMES, Sept. 21, 2001, at C2 (discussing a possible $17 billion settlement over the ownership of licenses NextWave Telecom purchased at auction in 1996).

123 *See Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, WT Docket No. 99-168, Sept. 17, 2001, 2001 WL 1083376, at ¶¶ 2-3, 11. Broadcast owner Paxson stood to gain $1 billion for its 18 channels as a result of a recent FCC rule permitting television broadcasters to sell spectrum space, originally given to them for free, which would otherwise have to be returned to the government in a few years. *Payday for Paxson*, BROADCASTING & CABLE, Sept. 24, 2001, at 33.

124 *See* Stephen Labaton*, Congress Severely Curtails Plan for Low-Power Radio Stations*, N.Y.TIMES, December 19, 2000, at A1. The lack of available spectrum is also one reason for the large number of unlicensed microbroadcasters, or "pirate" radio operators, that the FCC has shut down in recent years. *See, e.g.*, *United States v. Szoka*, 260 F.3d 516, 526 (6th Cir. 2001); *United States v. Any and All Radio Station Equipment*, 93 F. Supp. 2d 414, 417, 420-21 (S.D.N.Y. 2000). And, in 2001, the Commission had almost two-hundred pending, mutually-exclusive applications for forty-four commercial and noncommercial radio and television licenses. *See, e.g.,* Public Notice, DA 0-1-2242, *Window Opened to Permit Settlements for Closed Groups of Mutually Exclusive Broadcast Applications,* Sept. 27, 2001 (attaching list of 186 pending applications for 31 non-reserved FM licenses and 13 pending applications for three non-reserved television licenses).

Additionally, Congress has recognized and, in some cases, perpetuated the continuing scarcity of television licenses. For example, Section 204(a) of the1996 Telecommunications Act specifically reenacted the spectrum-scarcity-grounded public interest standard as the basis on which broadcast license renewals are to be granted.[125]

To the extent that Fox *et al*. argues that the spectrum is no more scarce than any other resource in the economic market,[126] Fox *et al*. ignores the fact that, unlike other resources, the broadcast licenses are a public resource held in trust and to be used in the public interest.[127] Unlike land, iron ore, and antenna sites, broadcast spectrum is "fixed" in that it must be licensed for the public's benefit, not freely traded as a commercial commodity.[128]

Finally, even if ownership regulations limit what non-broadcast media firms, such as newspaper or cable owners, can own, the rational basis standard still applies.[129] The broadcast ownership rules apply to all *broadcast* media owners, prospective owners, or applicants, regardless of their other ownership interests.

In sum, spectrum scarcity continues to be recognized by Congress and the marketplace, and Supreme Court decisions premised on spectrum scarcity remain valid.[130] Therefore, the

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[125] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 204(a) *codified at* 47 U.S.C. § 309(k). Congress also provided for a transition to digital television technology, but directed that the Commission "limit the initial eligibility for such licenses" to incumbent television licensees. *Id.* at § 201(a)(1).

[126] Owen's Statement at 5.

[127] Communications Act of 1934, 47 U.S.C. §§ 151, 301, 307, 309(a); *FCC v. League of Women Voters of Calif. et al*, 468 U.S. 364, 376-77 (1984) ("*League of Women Voters*") ("only those who satisfy the 'public interest, convenience, and necessity' are granted a license to use radio and television broadcast frequencies") (citing 47 U.S.C. § 309(a)).

[128] *See League of Women Voters*, 468 U.S. at 377 (1984) ("those who are granted a license to broadcast must serve in a sense as fiduciaries for the public by presenting 'those views and voices which are representative of [their] community and which would otherwise, by necessity, be barred from the airwaves.'")(citing *Red Lion*, 395 U.S. at 389).

[129] *See* NPRM at 11, ¶ 22.

[130] *See Fox Television*, 280 F.3d at 1046 ("The Supreme Court has already heard the empirical case against [the scarcity] rationale and still 'declined to question its continuing validity.'"), citing *Turner I*, 512 U.S. 622, 638 (1994).

Commission's broadcast ownership rules need only be rationally related to legitimate goals, including the court-sanctioned diversity and competition goals.[131]

B. Even if the Ownership Rules Are Intended to Promote Viewpoint Diversity in Local News and Programming, A Higher Level of First Amendment Scrutiny is Not Required.

The fact that one of the Commission's goals is to promote viewpoint diversity in news and other local informational programming does not mandate a higher level of scrutiny. Fox *et al.* wrongly assert that the Commission's focus on news and public affairs programming is a content-based restriction and that broadcast ownership restrictions should be subject at least to the *O'Brien*, or intermediate scrutiny, test.[132]

Under established Supreme Court precedent, "the principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."[133] Evaluated under the Supreme Court's standard, the Commission's ownership rules are content-neutral structural regulations enacted to promote viewpoint diversity.[134]

Courts have historically found that broadcast ownership regulations are content-neutral and are subject to rational basis constitutional scrutiny because they seek to ensure viewpoint diversity through the regulation of industry structure rather than viewpoints or content. In *Fox*,

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[131] *Sinclair*, 284 F.3d at 160, 167-69.
[132] Fox Comments at 8-9 (citing *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968) (government regulation of speech is permissible "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.") ("O'Brien.").
[133] *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citations omitted).
[134] *See* NPRM at 15, ¶ 35 ("The principal means by which the Commission has fostered diversity of viewpoints is through the imposition of ownership restrictions" (internal citations omitted)); *see also* NPRM at 15, ¶ 36.

for example, the court determined that the national television station ownership rule was subject to "deferential review" as a content-neutral "regulation of industry structure, like the newspaper/broadcast cross-ownership rule the Court concluded was content-neutral in *NCCB*, and like the network ownership restriction upheld in *NBC*."[135] As the Commission noted in the NPRM, "[A] major benefit of content-neutral structural regulation is that we avoid making inescapably subjective judgments about editorial decisions, viewpoints, and content."[136]

The Commission's aspiration to promote the availability of diverse local news and public affairs programming does not make its ownership rules content-based. In *Turner I*, the Supreme Court rejected the assertion that Congressional acknowledgement of the importance of local broadcasting expressed in passing the cable television must-carry rules meant the must-carry rules were content-based.[137] Congress noted that broadcast television is "'an important source of local news, public affairs programming and other local broadcast services critical to an informed electorate,'" but the Court found "this reflects nothing more than the recognition that the services provided by broadcast television have some intrinsic value and, thus, are worth preserving against the threats posed by cable."[138] More recently, satellite carriers argued that the "carry one, carry all" provision of the Satellite Home Viewer Improvement Act (SHVIA) was content-based as the legislative history "suggest[ed] that Congress sought to protect local broadcast stations because those stations provide valuable news and public affairs programming to their

[135] *Fox Television*, 280 F.3d at 1046 (citing *NCCB*, 436 U.S. at 801 and *NBC*, 319 U.S. at 226-27. Additionally, the Supreme Court found that the must-carry provisions of the Cable Act of 1992 that required cable systems to carry local broadcast stations were not content-based restrictions because they imposed obligations on all operators based solely on their channel capacity and not "by reason of the views, programs, or stations the cable operator has selected or will select." *See Turner I*, 512 U.S. at 644, 646. Similarly, the broadcast ownership limits are based solely on ownership interests and do not impose any restriction based on views or programming of broadcasters or favor any particular point of view.
[136] NPRM at 15, ¶ 36.
[137] *Turner I,* 512 U.S. at 648.
[138] *Id*. (citation omitted).

communities."[139] The Fourth Circuit, following *Turner I*, determined that stated Congressional appreciation for local broadcast programming did not make the provision content-based.[140]

Like the rules at issue in *Turner I* and *Satellite Broadcasting*, the Commission's media ownership rules reflect a special concern for ensuring a diversity of information sources at the local level.[141] The Commission has recognized that "monopolization [of] the means of mass communications in a locality assure the monopolist control of information received by the public and based upon which it makes elective, economic and other choices."[142] As *Turner I* and *Satellite Broadcasting* demonstrate, the Commission's aspiration to ensure a diversity of local news and public programming sources does not mean its ownership rules are content-based, and those rules should continue to receive rational basis scrutiny.

Even assuming *arguendo* that intermediate scrutiny applied, the Commission's existing broadcast ownership rules and any future broadcast ownership rules should also satisfy the *O'Brien* test. The broadcast ownership rules further the important and substantial government interest of viewpoint diversity,[143] which is the "touchstone of the Commission's ownership rules and policies."[144] As the Supreme Court noted in *Turner I*, "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[145]

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139 *See Satellite Broad. & Communications Ass'n v. FCC,* 275 F.3d 337, 354 (4th Cir. 2001) *cert. denied*, 2002 U.S. Lexis 4476 (June 17, 2002) (citation omitted).
140 *See id.* at 354-55.
141 *See, e.g., Local TV Ownership Report and Order*, 14 FCC Rcd at 12912 (noting the Commission's "concern for ensuring diversity in broadcasting is most pressing at the local level").
142 *Id.* at 12912-13 (quoting *Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rule, Further Notice of Proposed Rule Making*, 10 FCC Rcd 3524, 3559 (1995)).
143 NPRM at 13, ¶ 29.
144 *See id.* at 14, ¶ 35.
145 *Turner I*, 512 U.S. at 663.

Additionally, as evidence by the consolidation of the radio industry and the erosion of broadcast diversity since relaxation of the ownership rules,[146] viewpoint diversity would certainly "be achieved less effectively" without media ownership limits.[147] Moreover, the rules will not burden "substantially more speech than is necessary" because they are limited in scope.[148] Thus, the media ownership rules should pass intermediate constitutional scrutiny because they seek to ensure a diversity of viewpoints without unduly burdening speech.[149]

CONCLUSION

As shown above, neither sole reliance on the antitrust laws nor proposals advanced by other parties adequately protect the public interest. Thus, the Commission should maintain its broadcast media ownership limits, which do not unconstitutionally restrict an owner from presenting its views, but do ensure that the public will have access to multiple viewpoints via the scarce broadcast spectrum.

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[146] *See* UCC Comments at 36-41.

[147] *Turner Broad. System, Inc. v. FCC*, 520 U.S. 180, 213-14 (1996) (Regulation of speech is permissible "'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation,'" and the regulation "does not 'burden substantially more speech than is necessary to further' that interest.") (citations omitted) (*"Turner II"*).

[148] *See Turner II,* 520 U.S. at 216 (finding the must-carry rules at issue were not unduly burdensome in part because Congress "took steps to confine the breadth and burden of the regulatory scheme," which included creating an exemption and other limitations). Similarly, the Commission's local media ownership rules include waivers where application of the rules would otherwise operate to reduce voices or viewpoints. *See, e.g., Local TV Ownership Report and Order*, 14 FCC Rcd at 12908 (permitting waiver of the local television ownership rule where one station is a "failed," "failing," or "unbuilt" station), 12909 (permitting waiver of the radio-television cross-ownership rule where one station is a "failed" station). The Commission further clarified its local rules and reaffirmed the waivers in *Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, Memorandum Opinion and Second Order on Reconsideration*, 16 FCC Rcd 1067 (2001).

[149] In *Turner II,* the Supreme Court also noted that content neutral regulations "are not 'invalid simply because there is some imaginable alternative that might be less burdensome on speech.'" (*Turner II*, 520 U.S. at 217 (citation omitted)).

Respectfully submitted,

________/s/________________

Amy Wolverton, Esq.
James Bachtell, Esq.
Angela J. Campbell, Esq.

Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9535

Of Counsel:

Maggie Martel
Christopher O'Connell
Petra Smeltzer

Law Students

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